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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TONY CARACCI, Defendant and Appellant.	B237643 (Los Angeles County Super. Ct. No. NA089085)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed as modified.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After a jury convicted defendant Tony Caracci of two counts of first degree burglary (§ 459)[1] and one count of receiving stolen property (§ 496, subd. (a)), defendant admitted that he had been convicted of a serious felony within the meaning of the Three Strikes law (§§ 667, subds. (b) – (i) & 1170.12, subds. (a) – (d)).

The crux of defendant's appeal is an attack on one of his two convictions for first degree burglary. First, he contends that the evidence is insufficient to sustain the conviction because the People failed to prove beyond a reasonable doubt that the victim's apartment was inhabited at the time of the burglary. Second, he contends that prejudicial instructional error occurred because the jury was not explicitly told that if it had a reasonable doubt whether the burglary was of the first degree, it must convict him of second degree burglary. We reject both of these contentions. Secondarily, defendant advances two minor claims of sentencing error, neither of which has merit. Other than directing preparation of a modified abstract of judgment to correct two minor omissions noted by the Attorney General, we affirm the judgment.

STATEMENT OF FACTS

Defendant and Megan Hull (the victim of the two burglaries) had a passing acquaintance with each other. On one occasion in May 2011, defendant had been in Hull's Long Beach apartment. He stayed "a couple hours" but then Hull asked him to leave because "things got a little awkward and uncomfortable. He started trying to make advances to [her]." Defendant left no personal belongings behind and Hull did not give him permission to return to her apartment.

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[1] All undesignated statutory references are to the Penal Code.

On May 22, 2011, Hull went to visit a friend in San Dimas, San Bernardino County. She planned to be gone "[j]ust a couple of days." As was her custom, Hull left her apartment key with her next door neighbors, Michael Cairncross and Margaret Kinney so that they could take care of her cats. Hull typically travels once or twice a month for "anywhere from two to five days."

During the evening of May 23, Kinney saw defendant outside of Hull's apartment. Defendant falsely told Kinney that he was waiting for his girlfriend. The next morning (May 24), Cairncross saw that a window screen in Hull's apartment was missing. Cairncross entered Hull's apartment and saw that a window was broken and "the place was trashed." Cairncross telephoned Hull who returned home. Hull discovered that her guitar and leather jacket were missing but that defendant's jacket was now hanging in her closet.

After Hull spoke with the police, she "went back to San Dimas with a friend to stay there," taking her cats with her. She did so "[t]o be safe, stay out of Long Beach." She intended to return to her apartment "whenever [she] could get the gas money to come out to pick up stuff, [her] belongings, and get it back over to San Dimas while [she] look[ed] for another apartment." She planned on moving out of the apartment. When Hull left, she again gave her keys to Cairncross and Kinney.

During the early morning of May 27, Cairncross and Kinney heard noises coming from Hull's apartment and contacted the police. The police came and ordered the occupant of Hull's apartment to come outside. Defendant stepped out of the apartment and was arrested. The police found Hull's missing leather jacket on a couch. From inside the jacket, the police recovered a black wallet containing property stolen from Hull as well as one John Schomberg. Schomberg's residence, located only a few blocks from Hull's apartment, had been burglarized approximately a week earlier.

Defendant did not testify and called no witnesses on his behalf. As set forth in defense counsel's closing argument, his theory of the case was that the People had failed to prove guilt beyond a reasonable doubt. In regard to the May 24th burglary, he argued that no one saw defendant either enter or leave Hull's apartment. In regard to the May 27th burglary, he argued that defendant lacked the intent to steal.

The jury convicted defendant on all three charges after deliberating for only 45 minutes.

Following advisement and waiver of his constitutional rights, defendant admitted the Three Strikes allegation, a 2003 conviction for first degree burglary. The trial court denied defendant's oral *Romero*[2] motion and sentenced him to an aggregate state prison term of 18 years and four months.

DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

In this appeal, defendant does not challenge the sufficiency of the evidence to support his convictions for either the May 24th burglary or receiving stolen property. He contends only that "the evidence was insufficient to establish that the May 27, 2011 burglary was first degree burglary" because "Hull had left the apartment with the intent to never return to sleep there." He asks us to reduce his conviction to second degree burglary.[3] We are not persuaded.

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[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

[3] The trial court's sentence on the May 27th burglary conviction was stayed pursuant to section 654, the stay to become permanent upon completion of the sentence for the May 24th burglary conviction.

"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55.)

Section 460, subdivision (a) provides: "Every burglary of an inhabited dwelling house . . . is burglary of the first degree." All other burglaries are of the second degree. (§ 460, subd. (b).)[4] Section 459 defines "inhabited" to mean "currently being used for dwelling purposes, whether occupied or not." In determining whether a dwelling is inhabited, its use as sleeping quarters is not determinative but, instead, is merely one circumstance the trier of fact can consider. (*People v. Hughes* (2002) 27 Cal.4th 287, 354-355; *People v. Hernandez* (1992) 9 Cal.App.4th 438, 441.)

The jury was instructed that if it found defendant guilty of burglary, it "must determine the degree thereof and state that degree in your verdict. [¶] There are two degrees of burglary. Every burglary of an inhabited dwelling house is burglary of the first degree. [¶] All other kinds of burglary are of the second degree." (CALJIC No. 14.51) The jury was further instructed: "An inhabited dwelling house is a structure which is currently used as a dwelling whether occupied or not. It is inhabited although the occupants are temporarily absent." (CALJIC No. 14.52.)

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[4] The punishment for first degree burglary is two, four or six years in state prison. (§ 461, subd. (a).) The punishment for second degree burglary shall "not exceed[] one year" "in the county jail" or "imprisonment pursuant to subdivision (h) of Section 1170." (§ 461, subd. (b).) Section 1170, subdivision (h)(1) provides a term in custody of 16 months, two years or three years.

Viewing the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the jury's finding that at the time defendant committed the May 27th burglary, Hull's apartment was inhabited. All of Hull's property (except for the cats) was still present. Hull had, understandably, left to stay temporarily with friends because defendant—an individual with whom she had a passing acquaintance—had just burglarized her home. Although Hull planned to look for another living space, she had not abandoned her apartment as her home. There was no evidence that she had found another residence or had given notice to her landlord. "A formerly inhabited dwelling becomes uninhabited *only when its occupants have moved out permanently and do not intend to return to continue or to resume using the structure as a dwelling*. [Citations.]" (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 320, italics added.)

Defendant's contrary arguments are not persuasive. His claim that Hull "had left the apartment with the intent to never return to sleep there" is not supported by the record. Simply stated, Hull never testified to that point. Equally unpersuasive is defendant's reliance on Cairncross' testimony that on May 24, he (Cairncross) did not think Hull "even wanted to spend the night" because she "was real shaken about staying there, afraid [defendant] was going to come back. . . . She was frightened." That testimony addressed only Hull's intent for that specific evening—not her intent to continue to live in the apartment—and was based upon Hull's immediate (and well-founded) concern that defendant would return.

Our conclusion that substantial evidence supports the jury's finding that Hull's apartment was inhabited on May 27 is consistent with public policy. Because burglary laws are based on the recognition that the crime both poses a significant danger to personal safety and involves an invasion of the victim's privacy, "'[t]he '"'"inhabited-uninhabited" dichotomy turns not on the immediate presence or absence of some person but rather on the character of the use of the

building.'" [Citation.] "[T]he proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusion." [Citation.]'" (*People v. Hughes, supra*, 27 Cal.4th at p. 355, quoting from *People v. DeRouen* (1995) 38 Cal.App.4th 86, 91-92.) On this record, the jury could reasonably conclude that Hull was still using the apartment as her dwelling and could reasonably expect no unauthorized intrusion would occur.

B. INSTRUCTIONAL ERROR

Defendant next contends, relying upon *People v. Dewberry* (1959) 51 Cal.2d 548, 555 (*Dewberry*), that in regard to the May 27th burglary, the trial court committed prejudicial error because it did not sua sponte instruct the jury "that it must find [him] guilty of second degree burglary if it found [him] guilty of burglary but had a reasonable doubt as to the degree of the offense." We disagree.

Dewberry held that "when the evidence is sufficient to support a finding of guilt of both the offense charged *and a lesser included offense*, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*Dewberry, supra*, 51 Cal.2d at p. 555, italics added.)

Defendant has not cited any relevant authority for the proposition that second degree burglary is a lesser included offense of first degree burglary.[5] This constitutes a forfeiture of his claim of error. (*People v. Wilkinson* (2004) 33

[5] Defendant cites only *People v. Cardona* (1983) 142 Cal.App.3d 481, 484. However, *Cardona* did not hold that second degree burglary is a lesser included offense of first degree burglary. Instead, it simply observed, in the context of reducing the defendant's conviction from first degree burglary to second degree burglary that the latter was "the lesser offense." (*Ibid*.)

Cal.4th 821, 846, fn. 9.) Were we to consider the issue, we would conclude that second degree burglary is not a lesser included of first degree burglary. "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, *such that the greater cannot be committed without also committing the lesser*. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118, italics added.) In this case, the difference between the two offenses is the status of the burglarized structure: inhabited versus uninhabited. The two are mutually exclusive. If a defendant has committed a first degree burglary, he has not and could not have committed a second degree burglary.

In any event, assuming arguendo that *Dewberry* even applies to this case (a holding we do not make), no prejudicial error occurred. The jury was instructed to determine whether the burglary was of the first or second degree and was given the proper definition of an inhabited dwelling, the predicate to a first degree burglary conviction. (CALJIC Nos. 14.51 & 14.52.) The jury was further instructed that if the circumstantial evidence permitted two reasonable inferences, one pointing to guilt and the other to innocence, it must adopt the interpretation pointing to innocence (CALJIC No. 2.01) and that unless the evidence established guilt beyond a reasonable doubt, defendant was entitled to a not guilty verdict (CALJIC No. 2.90). Taken as a whole (*People v. Burgener* (1986) 41 Cal.3d 505, 538), the instructions essentially informed the jury that if it had a reasonable doubt that the burglary was of the first degree, it should find defendant guilty of second degree burglary. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262-1263 [failure to submit a *Dewberry* instruction is cured if jury is otherwise properly instructed].)

Further, in light of the evidence and the defense theory of the case, any failure to submit a *Dewberry* instruction was not prejudicial. "[T]he test of

whether the [*Dewberry*] error was prejudicial is that of *People v. Watson* (1956) 46 Cal.2d 818, 836: whether it is reasonably probable that, in the absence of the error, the result would have been more favorable to the defendant. [Citations.]" (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) As explained earlier, substantial evidence established that the apartment was inhabited on May 27. Defendant's theory was not that the apartment was uninhabited so that he was guilty only of second degree burglary. Instead, defendant argued that he did not commit *any* burglary on May 27 because he lacked the intent to steal when he entered the apartment. After deliberating only 45 minutes, the jury found defendant guilty of all three charges. It is therefore not reasonably probable defendant would have been convicted of second degree burglary instead of first degree burglary had a *Dewberry* instruction been submitted.

C. PRE-SENTENCE CONDUCT CREDITS

Defendant committed his crimes in May 2011. The trial court sentenced him on September 28, 2011 and ultimately gave him 187 days of presentence credit: 125 days for time served and 62 days of conduct credit.[6]

In this appeal, defendant contends that he should be granted an additional 62 days of pre-sentence conduct credits. He relies upon the version of section 4019, subdivision (f) enacted in 2011 that increased the award of conduct credits. However, subdivision (h) of section 4019 provides that this statutory change "shall apply prospectively and shall apply to prisoners who are confined . . . *for a crime*

[6] At the sentencing hearing, the trial court awarded defendant 150 days of presentence credit: 125 days served and 25 days of conduct credit. Thereafter, appellate counsel filed a request in the trial court to correct this award to reflect 187 days of presentence credit, consisting of 125 actual days and 62 days of conduct credit. The trial court granted the request and a new amended abstract of judgment was prepared to reflect this change.

committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Italics added.) Defendant acknowledges this language but, nonetheless, urges that the statute "applies to [his] sentence by virtue of equal protection." Our state's appellate courts have consistently rejected this argument. We see no reason to add to the discussion other than to note that we, too, find no merit to the claim. (*People v. Brown* (2012) 54 Cal.4th 314, 328-330; *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 53-56; *People v. Verba* (2012) 210 Cal.App.4th 991, 995; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395-399; and *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1550-1553.)

D. RESTITUTION AND PAROLE REVOCATION FINES

Defendant requests that we modify the abstract of judgment regarding imposition of the restitution fine and parole revocation fine to conform to the amounts stated in the trial court's oral pronouncements. We decline to do so because, as explained below, the record establishes that the amounts stated in the abstract of judgment accurately reflect the trial court's intent.

1. *Factual Background*

At the sentencing hearing, the trial court stated: "Pay $200 restitution and the same amount on parole revocation." However, both the court's minutes and the abstract of judgment reflected a different amount: $3,800 for each fine.

Appellate counsel brought this discrepancy (as well as an issue regarding calculation of conduct credit) to the trial court's attention through a written request. (See fn. 6, *ante*.) Citing the rule that in the event of a conflict between the oral pronouncement of judgment and the written abstract of judgment, the oral

pronouncement controls, counsel asked the trial court to amend the abstract of judgment to reduce each of the two fines to $200.

The trial court denied the request. Its minute order explains: "As to the restitution fine and parole revocation fine of $3,800 each, the court finds that the court's notes reflect $200.00 per year for a total of $3,800. No correction needed."

2. *Discussion*

The general principle is that the abstract of judgment "does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Thus, it has been held that when the trial court fails to mention a prior conviction in pronouncing judgment, a reference to such a conviction in the abstract of judgment must be stricken because "*in the absence of evidence to the contrary*, it may be inferred that the omission [in the oral pronouncement of judgment] was an act of leniency by the trial court [operating] as a finding that the prior conviction was not true." (*In re Candelario* (1970) 3 Cal.3d 702, 706, italics added.) Stated another way, because entering the judgment in the minutes is simply a clerical function, "*a discrepancy* between the judgment as orally pronounced and as entered in the minutes is *presumably the result of clerical error*." (*People v. Mesa* (1975) 14 Cal.3d 466, 471, italics added.)

The italicized language in these two Supreme Court cases makes clear that the oral judgment prevails only if there is no evidence to establish that the trial court's true intent is that which is embodied in the abstract of judgment. Here, such evidence exists. Upon receiving the defense request to modify the abstract of judgment, the trial judge consulted his notes and found that his intent had been to impose a $3,800 restitution fine and $3,800 parole revocation fine and that is why

both the court's minutes and the abstract of judgment reflected those amounts.[7] The judge's finding, based upon review of his notes made for the sentencing hearing, rebutted any presumption that the $3,800 fines in the abstract of judgment were the result of clerical error or that the court's oral statement imposing the minimum $200 fines was an act of leniency. This circumstance therefore distinguishes the present matter from the cases defendant relies upon to support his request that we modify the abstract of judgment to reflect $200 fines.

E. IMPOSITION OF ASSESSMENTS AND FEES

The abstract of judgment reflects imposition of a $30 criminal conviction assessment (Gov. Code, § 70373) and a $40 court security fee. (§ 1465.8.) The Attorney General correctly notes that an assessment and fee should have been imposed for each of defendant's three convictions. (Gov. Code, § 70373, subd. (a)(1); § 1465.8, subd. (a)(1).) We direct modification of the abstract of judgment to reflect those requirements.

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[7] The Attorney General correctly notes that a $3,800 fine was consistent with the law in effect when defendant was sentenced. At that time, former section 1202.4, subdivision (b)(1) and (2) provided that the court could set a restitution fine between $200 and $10,000. Further, the court had the discretion to "determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve." (Former § 1202.4, subd. (b)(2).) Here, defendant was sentenced to almost 19 years. $200 times 19 equals $3,800.

DISPOSITION

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a modified abstract of judgment reflecting the imposition of three $30 criminal conviction assessments (Gov. Code, § 70373, subd. (a)(1)) and three $40 court security fees (§ 1465.8, subd. (a)(1)). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.